

**Letter of Findings: 09-0371
Sales and Use Tax
For the Tax Years 2006 and 2007**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1(c); [45 IAC 2.2-5-54](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Commissioner's Directive 25 (July 2004).

Taxpayer protests the imposition of sales tax on its sales to Indiana and out-of-state customers.

II. Use Tax – Imposition.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-3-4; [45 IAC 2.2-4-2](#)

Taxpayer protests the imposition of use tax on its purchases of tangible personal property.

III. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Indiana dealer, sells new tractors, all-terrain vehicles (ATVs), rugged terrain vehicles (RTVs), lawn mowers, and attachments. Taxpayer also accepts trade-ins from its customers and resells the trade-ins. Additionally, Taxpayer sells farm supplies as well as repairs and services its customers' equipment.

Pursuant to an audit, the Department of Revenue ("Department") determined that Taxpayer failed to collect and remit sales tax on some tangible personal property, which Taxpayer sold to Indiana and out-of-state customers in 2006 and 2007. The Department's audit also found that Taxpayer failed to pay sales tax or self-assess and remit use tax to the Department when it purchased tangible personal property for its own use. The Department's audit assessed sales and use tax, interest, and penalty. Taxpayer protested the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition.

DISCUSSION

After an audit, the Department assessed Taxpayer sales tax on its sales to Indiana and out-of-state customers during 2006 and 2007. The Department's audit determined that Taxpayer failed to obtain the required exemption certificates from its Indiana customers on the alleged exempt sales. Additionally, the Department's audit determined that, on the out-of-state sales, Taxpayer failed to document its delivery to out-of-state purchasers. Taxpayer, to the contrary, first argued that its sales to Indiana customers were exempt from sales tax. Taxpayer further argued that it cannot be held responsible for collecting sales tax on its sales to out-of-state customers.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states,

(a) The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction and shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction.

(b) The retail merchant shall collect the tax as agent for the state.

Taxpayer, a dealer, is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

To support its protest, Taxpayer provided additional documentation prior to an administrative hearing. After the hearing, Taxpayer was given more time to obtain and submit additional documentation.

A. Sales to Indiana Customers.

Pursuant to IC § 6-2.5-2-1, Taxpayer was responsible for collecting sales tax on its sales to Indiana customers unless its customers provided Taxpayer with exemption certificates. Prior to and after the administrative hearing, Taxpayer submitted additional documentation to demonstrate that it met the statutory requirement. The Department, thus, agrees that Taxpayer was not responsible for collecting and remitting sales tax on the following items:

Date	Reference	Item Description	Amount
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05/09/2006	95872	SOLENOID	\$ 126.56
12/20/2006	98122	KUB FRONT END LOADER	\$ 3,500.00
06/28/2006	96571	KUB ASSY CASE	\$ 558.29
06/29/2006	96578	KUB MISC PARTS	\$ 459.56
12/30/2006	98175	KUB 23 HP W/BUCKET	\$ 11,996.00
09/27/2006	97540	KUB TRACTOR	\$ 9,740.00
05/30/2007	99413	HH FRONT LOADER	\$ 3,750.00
08/28/2007	100300	MISC ITEMS	\$ 1,417.17
04/02/2007	98667	MISC ITEMS	\$ 227.53
04/05/2007	98721	MISC PARTS	\$ 273.48

Taxpayer, however, remains responsible for sales tax on the remainder of its sales to Indiana customers, for which no exemption certificates were provided. The Department will recalculate the assessment in a supplemental audit.

B. Sales to Out-of-State Customers.

The Department assessed sales tax on Taxpayer's sales to out-of-state purchasers. Taxpayer failed to document that it delivered the merchandise to out-of-state purchasers. Taxpayer argues that since the purchasers resided in states other than Indiana, the sales to these out-of-state purchasers were exempt "out-of-state sales."

[45 IAC 2.2-5-54](#) states:

- (a) Delivery to purchaser in Indiana. Sales of tangible personal property which are delivered to the purchaser in Indiana are subject to gross retail tax or use tax, except (see Regs. 6-2.5-5-15(020) [\[45 IAC 2.2-5-22\]](#)) for certain sales of motor vehicles and aircraft.
- (b) Delivery to purchaser in a state other than Indiana. Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.
- (c) Delivery by common carriers.
 - (1) Delivery to common carrier in Indiana for shipment to another state by common carrier shall be deemed delivery to a purchaser in a state other than Indiana for purposes of applying the gross retail tax or use tax.
 - (2) Delivery to common carriers in a state other than Indiana for shipment to Indiana shall be deemed delivery to a purchaser in Indiana for purposes of applying the use tax.

The Department issued Commissioner's Directive 25 (July 2004) to address the issue of sales to out-of-state purchasers and stated that:

For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.

Similar to a car dealer, Taxpayer, a dealer, sold tangible personal property to out-of-state purchasers and claimed that these sales were exempt from Indiana sales tax. However, when out-of-state purchasers came to Indiana and took possession of the tangible personal property at the time of the transactions in Indiana, the sales were Indiana sales and subject to Indiana sales tax. Only when Taxpayer delivers the merchandise to out-of-state purchasers, are the sales considered exempt out-of-state sales. Thus, pursuant to [45 IAC 2.2-5-54](#) and Commissioner's Directive 25, Taxpayer must document that it delivered the items to the out-of-state purchasers to be relieved from collecting and remitting Indiana sales tax.

During the hearing process, Taxpayer submitted additional documentation demonstrating that it delivered some of the merchandise to out-of-state customers. The Department, thus, agrees that Taxpayer was relieved from collecting and remitting Indiana sales tax on the following items:

Date	Reference	Item Description	Amount
09/09/2006	97360	BH ZT250	\$ 3,500.00
12/30/2006	98178	KUB 43HP CAB 4WD W/FRONT LOADER	\$ 8,500.00
12/26/2006	98145	NO INVOICE FOUND	\$ 26,775.00
02/20/2006	94871	WORKSITE VEHICLE	\$ 12,647.00
12/31/2007	101244	NO INVOICE FOUND	\$ 10,900.00
03/26/2007	98568	BUSHHOG LOADER	\$ 4,000.00
03/22/2007	98517	UM L3130HST	\$ 14,000.00
11/27/2007	101043	CASE IH 255	\$ 3,025.00
01/16/2007	98255	UN LAWN TRACTOR	\$ 450.00
06/22/2007	99670	UM B22710HSD	\$ 14,075.00

04/18/2007

98864

UM W/FRT LOADER

\$ 18,000.00

Taxpayer, however, remains responsible for collecting Indiana sales tax on the remainder of its sales to out-of-state customers, for which no records of Taxpayer's delivery were provided. The Department will recalculate the assessment in a supplemental audit.

FINDING

Taxpayer's protest is sustained in part and respectfully denied in part. The Department will recalculate the assessment in a supplemental audit.

II. Use Tax – Imposition.

DISCUSSION

The Department's audit assessed use tax on Taxpayer's purchases of two computer software programs with updates (\$800) and two annual "price file" subscriptions (\$1,015).

At the hearing, Taxpayer agreed that the two computer software programs with updates (\$800) were taxable. Taxpayer, however, argued that the two annual "price file" subscriptions (\$1,015) were not subject to sales and/or use tax. Taxpayer believed that it had subscribed to a service and, as a service, it was not subject to sales and/or use tax pursuant to [45 IAC 2.2-4-2](#).

In addition to a sales tax on retail transactions, Indiana imposes a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-3-2. However, the storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property. IC § 6-2.5-3-4(a)(1).

[45 IAC 2.2-4-2](#)(a), in pertinent part, provides,

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax.

Taxpayer maintained that, as a dealer, it received information concerning the models, recommended retail prices, and details of the merchandise from the manufacturers. In responding to inquiries from prospective customers, Taxpayer needed a searchable database which allowed Taxpayer to search for information out of all the merchandise it was selling. Taxpayer, thus, engaged a vendor, which specialized in compiling the information that Taxpayer received from each manufacturer into one searchable database program.

Taxpayer has provided sufficient documentation demonstrating that the vendor provided a service to compile Taxpayer's "price file." Therefore, Taxpayer's protest on the two annual "price file" subscriptions (\$1,015) is sustained. Taxpayer, however, remains responsible for use tax on the two computer software programs with updates (\$800). The Department will recalculate the assessment in a supplemental audit.

FINDING

Taxpayer's protest on the two annual "price file" subscriptions (\$1,015) is sustained. Taxpayer, however, remains responsible for the use tax due on the two computer software programs with updates (\$800) because Taxpayer withdrew its protest on this assessment at the hearing. The Department will recalculate the assessment in a supplemental audit.

III. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the assessment of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be

considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has provided sufficient documentation establishing that its failure was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is sustained.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the imposition of sales tax is sustained in part and denied in part. Taxpayer's protest on the imposition of use tax is sustained on the annual "price file" subscriptions. Taxpayer's protest of the negligence penalty is also sustained. Taxpayer, however, remains responsible for the use tax due on the two computer software programs with updates (\$800). The Department will recalculate the assessment in a supplemental audit.

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